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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1605

LT. ALVIN A. ROSENFELD, M.D., PETITIONER

v.

REAR ADMIRAL RICHARD E. RUMBLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that his answer to an allegedly tainted hypothetical question improperly constituted the sole basis in fact for the denial of his discharge from military service as a conscientious objector.

On February 21, 1974, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts, seeking discharge from the United States Navy Reserve as a conscientious objector. Upon consideration of the government's substitute motion to dismiss the petition, the United States Magistrate found that "there is a serious question as to whether there is a 'basis in fact' * * *

in view of the totality of the record * * *'" (Pet. App. 52–53). The magistrate therefore concluded that the issue whether there was a basis in fact for the denial of the discharge should be determined by the district court on the merits. On December 10, 1974, the district court granted the government's motion to dismiss, finding a basis in fact for the denial of the discharge (Pet. App. 19–30). The court of appeals affirmed (Pet. App. 13–17).

1. The pertinent facts are not in dispute. In March, 1971, petitioner accepted a commission in the United States Navy pursuant to the "Berry Plan," a deferred entrance program for physicians who enter specialty residence training. Petitioner incurred a six-year reserve and two-year active duty obligation. At the conclusion of his residency in the summer of 1974, petitioner was scheduled to commence active duty.

On February 28, 1973, petitioner filed an extensive application for discharge as a conscientious objector, reciting therein that he was "of the belief that all warfare is amoral." The cornerstone of petitioner's rejection of violence "as a means to any end, save self-preservation" centered in large part upon his acute awareness of the atrocities perpetrated against Jewish people generally, and more particularly his own family, in Nazi Germany. Petitioner stated: "I reserve the use of violent force for self-preservation. * * * What I * * * deny is that violence must be resorted to as a method of resolution of conflict man to man. Resolution must come about by an exercise of toler-

ance and reason and the implementation of the ethic of charity in every conflict."[1]

On March 29, 1973, petitioner was interviewed by a Navy chaplain, who concluded that there was no reason to doubt petitioner's sincerity. On March 30, 1973, petitioner was interviewed by three psychiatrists, who found that "the mental status examination [of petitioner] was within normal limits for a man of his background and station in life." (See Pet. 4.)

On May 24, 1973, a hearing was held on petitioner's application for discharge as a conscientious objector. At the hearing, petitioner, who was represented by counsel, emphasized that he was not a pacifist, in that he would defend himself from attack if he "saw no other means * * * available" (Pet App. 46). Petitioner stated that his conscientious objection to war stemmed from the moral and ethical teachings of the Jewish faith.

During the course of the proceedings, petitioner twice stated that he could not say whether or not he would have participated in World War II.[2] The hear-

[1] Petitioner's application was supplemented with twenty-one letters from rabbis, professional colleagues and close friends. All attested to petitioner's sincerity (Pet. App. 20).

[2] The text of this colloquy follows (Pet. App. 47–48):

"Q. What's your—would you have participated in World War II against the Nazis?

"A. I wasn't alive in World War II, so I don't know.

"Q. Well, I'm aware of that.

"A. It's—yes—I mean at this point I wouldn't participate in any war anywhere unless——

"Q. Would you answer my question? Would you have participated in World War II in an attempt to stop the expansion

ing officer thereupon posited the following hypothetical question (Pet. App. 48):

> Q. Well, let's assume that Russia commenced a policy of a violent, forceful, external, geographical expansion which involves the use of arms. All right? And let's assume that in this policy of forceful expansion they embark upon a policy of extermination of all Jews. Would you bear arms against that aggressor?
> A. If Russian troops landed on the shores of San Francisco—I am an American and, if attacked and—by a clear, definite enemy where there is no choice and no question that another human being is threatening me, my family, I would then bear arms.

Petitioner stated further: "I would bear arms only if I were personally—my family or my country were definitely threatened by an obvious human aggressor" (Pet. App. 48). The hearing officer subsequently inquired whether the use of force was limited to invasions which were physically proximate to petitioner and his family, or whether petitioner would bear arms to resist an invasion of any physical boundary of the country. Petitioner responded: "Well, I believe that I can only bear arms when myself or my family is physically put in danger; and I think that is at the territorial boundaries of my country" (Pet. App. 50).

On July 11, 1973, the hearing officer issued his report recommending denial of petitioner's applica-

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and the infliction of policies, which are well known and evidenced in your application, which the Nazis followed?

"A. I wasn't alive then. I can't say what I would have done."

tion for a discharge as a conscientious objector. He concluded that petitioner was not opposed to participation in war in any form under all circumstances.[3] The Commandant of the First Naval District concurred in the recommendation to deny the application,[4] and on September 28, 1973, the Chief of Naval Personnel rejected petitioner's application and found that petitioner "[is] not opposed to participation of any kind in war in any form" (Pet. App. 23).

The petition for a writ of habeas corpus was filed to review this final administrative determination.

2. Petitioner is incorrect in contending that his answer to a question that he believes was improper provided the sole basis in fact for denial of his application for discharge as a conscientious objector.

One seeking classification as a conscientious objector is required to satisfy three basic tests. He must

[3] The hearing officer stated:

"I am unpersuaded by the preponderance of the credible evidence that there were any developments which occurred subsequent to the applicant's acceptance of his commission and taking of the oath which can reasonably explain and be a basis for the existence of a true conscientious objector which did not exist prior to his entry into the service. It is my conclusion that, even if it were to be assumed that the applicant is a true conscientious objector within the meaning of 50 U.S.C., Section 6(j), it existed prior to his entering the military service" (from Commander Copeland's Report to the Commandant, containing his findings regarding petitioner's applicaton, dated 11 July 1973, p. 3).

[4] The Commandant upheld the hearing officer's view that petitioner "does not hold a sincere objection to participation in war in any form or to the bearing of arms" (Pet. App. 23).

demonstrate (1) sincere opposition (2) to participation in war in any form, (3) based upon religious training and belief, as the term has been construed in this Court's decisions. *Clay* v. *United States,* 403 U.S. 698, 700. See also *Witmer* v. *United States,* 348 U.S. 375; *United States* v. *Shomock,* 462 F. 2d 338 (C.A. 3); *Scott* v. *Commanding Officer,* 431 F. 2d 1132 (C.A. 3); *United States* v. *Broyles,* 423 F. 2d 1299 (C.A. 4). As the district court observed (Pet. App. 25), there is no question that petitioner is sincere or that his opposition to war is based upon his religious beliefs. The only question is whether those beliefs truly constitute an opposition to participation in "war in any form."

In resolving this question, the hearing officer relied upon petitioner's refusal to answer whether he would have participated in World War II. See note 2, *supra.* Petitioner's candid inability to state whether, consistent with his beliefs, he would have participated in World War II—an inability to respond, not to a hypothetical question, but to definite and known circumstances of obvious relevance to the question of his classification—is wholly inconsistent with the opposition to participation in war in any form that petitioner was required to demonstrate. One actually opposed to participation in war in any form could have answered the question. This factor, relied upon by the hearing officer, constitutes a sufficient basis in fact for the conclusion that petitioner was not a conscientious objector within the meaning of the statute, 50

U.S.C. App. 456(j).[5] See, *e.g.*, *United States* v. *Curry*, 410 F. 2d 1297 (C.A. 1). Thus, contrary to petitioner's assertion, his answers to the allegedly tainted hypothetical question (see *supra*, p. 4) did not constitute the sole basis in fact for the denial of his application for discharge as a conscientious objector.

The courts below concluded that petitioner's willingness to bear arms in the event of an attack by a foreign aggressor within the territorial boundaries of the United States was a sufficient basis in fact for the denial of his application for discharge as a conscien-

[5] Judicial review in Selective Service classification cases generally (*Estep* v. *United States*, 327 U.S. 114, 122–123; *United States ex rel. Trainin* v. *Cain*, 144 F. 2d 944 (C.A. 2)), and conscientious objector cases in particular (*Ferrand* v. *Seamans*, 488 F. 2d 1386 (C.A. 2); *Bates* v. *Commander, First Coast Guard District*, 413 F. 2d 475, 477 (C.A. 1)), is limited to the question whether there is a "basis in fact" for the decision reached by the draft board or, as in this case, the commanding officer. As the district court noted, some courts "have referred to this type of review as the 'narrowest known to the law.' *Blalock* v. *United States*, 247 F. 2d 615, 619 (4th Cir., 1957). *See*, *Cohen* v. *Laird*, 315 F. Supp. 1265, 1271 (D.S.C., 1970), aff'd., 439 F. 2d 866 (4th Cir., 1971)" (Pet. App. 24). While this standard permits courts to strike down unsupported and conclusory determinations of an official or board, at the same time it serves the salutary purpose of precluding the courts from sitting as *de novo* tribunals. *United States* v. *Orr*, 474 F. 2d 1365, 1368 (C.A. 2). Accordingly, if there is objective evidence in the administrative record showing that the applicant has not met all of the requirements that would establish a conscientious objector claim, even though this evidence is not preponderant or substantial, the finding must be sustained. *United States ex rel. Donham* v. *Resor*, 436 F. 2d 751, 753 (C.A. 2). See Pet. App. 24.

tious objector.[6] Petitioner assails this reliance upon his responses to a hypothetical question which he believes was improper because it added to the question of a territorial attack by a foreign aggressor the element of extermination of Jews as an object of the aggression. Since the nature of the hypothetical question derived

[6] "Willingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community, has not been regarded as inconsistent with a claim of conscientious objection to war as such." *Gillette* v. *United States*, 401 U.S. 437, 448. The district court, on whose opinion the court of appeals principally relied (Pet. App. 14), recognized this principle, but concluded that petitioner's willingness to bear arms was not dependent upon geographical proximity or the imminent threat of violence (Pet. App. 26–27). Petitioner had stated that he would bear arms to protect himself, his family and his country if an obvious human aggressor attacked the United States. In this regard, the court of appeals observed (Pet. App. 15–16):

"We are not insensitive to the genuineness of appellant's feeling that he would look upon an invader bent on extinguishing his co-religionists in this country as an immediate threat to his 'family,' extended and nuclear. There is recent history to back him up. But if exemption is given appellant for this reason, must not it also be given a Mormon, a Seventh Day Adventist, or to hark back to the Crusades, any professed Christian, if the invader be 'infidel'? These hypothetical cases are of course quickly distinguished by their lack of verisimilitude—they are fantasies, whereas the holocaust was real. The existence of such an historical background is highly relevant on the issue of sincerity. But to allow it to be used to define the parameters of a person's family or community, so that fighting in defense of the country can be equated with defense of self and family, seems to us an irrational basis or distinction. For example, a patriotic humanist, believing in no God but deeply believing that the nation is his 'family', would not, despite the intensity of his view of community, be entitled to his definition for purposes of qualifying as a conscientious objector." (Footnote omitted.)

from petitioner's inability to state whether he would have participated in World War II, it was not improper. The court of appeals rejected petitioner's claim, stating (Pet. App. 16–17):

> The contention is that the injection into hypothetical questions of the assumption that a foreign invader would be bent on extermination of all Jews placed an unfair burden on appellant. Appellant calls these "loaded" questions. While we are not obligated to deal with this new issue, we do so in view of its nature. For if we were convinced that appellant had been lured by trickery on to treacherous ground, we would not take refuge in a procedural shelter. And it may well be that the effort to imagine honestly one's response to the hypothetical situation described is unique for a group that had in recent history a real experience. Had the hearing officer devised the question out of thin air, that is, just because appellant was of Jewish background and faith, we would be troubled. But a substantial, if not the major, thrust of appellant's seventy-page application for discharge was directed to his reflections over the enormity of the Nazi persecutions. Under these circumstances it was natural for the hearing officer to refer to this background in exploring the position of appellant. We are aware of the atmosphere of unreality created by hypothetical questions. Yet the Congressional mandate of "participation in war in any form" leaves no alternative to probing. Our view of the record reveals no indication of perverse imagination or exploitation by

the hearing officer. Indeed, counsel for appellant pursued the same line of inquiry, obviously deeming it both relevant and fair at the time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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